

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

TRAVELERS CASUALTY AND SURETY COMPANY as
Administrator for RELIANCE INSURANCE COMPANY,

Plaintiff,

VS.

DORMITORY AUTHORITY – STATE OF NEW YORK,
TDX CONSTRUCTION CORP. and KOHN PEDERSEN
FOX ASSOCIATES, P.C.,

Defendants.

No. 07-CV-6915 (DLC)
ECF CASE

DORMITORY AUTHORITY OF THE STATE OF NEW YORK
AND TDX CONSTRUCTION CORP.,

Third-Party Plaintiffs,

VS.

TRATAROS CONSTRUCTION, INC.,

Third-Party Defendant.

**: ANSWER OF
: LUMBERMENS
: MUTUAL CASUALTY
: COMPANY improperly
: sued as KEMPER
: CASUALTY
: INSURANCE
: COMPANY TO
: CROSS-CLAIM OF
: BARTEC INDUSTRIES,
: INC.**

TRATAROS CONSTRUCTION, INC. and TRAVELERS
CASUALTY AND SURETY COMPANY,

Fourth-Party Plaintiffs,

VS.

CAROLINA CASUALTY INSURANCE COMPANY; BARTEC :
INDUSTRIES, INC.; DAYTON SUPERIOR SPECIALTY :
CHEMICAL CORP. a/k/a DAYTON SUPERIOR CORPORATION: :
SPECIALTY CONSTRUCTION BRANDS, INC. t/a TEC; :
KEMPER CASUALTY INSURANCE COMPANY d/b/a KEMPER: :
INSURANCE COMPANY; GREAT AMERICAN INSURANCE :
COMPANY; NATIONAL UNION FIRE INSURANCE :
COMPANY OF PITTSBURGH, PA; UNITED STATES FIRE :
INSURANCE COMPANY; ALLIED WORLD ASSURANCE :
COMPANY (U.S.) INC. f/k/a COMMERCIAL UNDERWRITERS :

INSURANCE COMPANY; ZURICH AMERICAN INSURANCE' :
 COMPANY d/b/a ZURICH INSURANCE COMPANY; OHIO :
 CASUALTY INSURANCE COMPANY d/b/a OHIO CASUALTY :
 GROUP; HARLEYSVILLE MUTUAL INSURANCE COMPANY :
 (a/k/a HARLEYSVILLE INSURANCE COMPANY); JOHN DOES :
 1-20 and XYZ CORPS. 1-20, :
 :
 :
 _____ Fourth-Party Defendants. :

Comes now Fourth-Party Defendant Lumbermens Mutual Casualty Company ("LMC"), improperly sued as Kemper Casualty Insurance Company d/b/a Kemper Insurance Company,¹ and for its Answer to the Cross-Claim of Bartec Industries, Inc. states as follows:

41. LMC denies that the Fourth-Party Plaintiffs sustained any damages or injuries, that LMC engaged in any culpable conduct, acts or omissions, negligence, strict products liability, statutory violation, breach of contract, obligation or warranty, and that Cross-Claimant is entitled to indemnification or contribution from, and to have judgment entered against, LMC for all or any part of any verdict or judgment that the Fourth-Party Plaintiffs may recover against Cross-Claimant. LMC is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 41 of the Cross-Claim.

WHEREFORE, LMC prays that this Court enter judgment against Cross-Claimant Bartec Industries, Inc. as to all of its claims against LMC in the Cross-Claim of Bartec Industries, Inc., including that Bartec Industries, Inc. is not entitled to indemnification or contribution from LMC for all or any part of any verdict or judgment that the Fourth-Party Plaintiffs may recover against Bartec Industries, Inc. and that this Court grant LMC its attorneys' fees, costs incurred in defending against this Cross-Claim, and such other relief that this Court deems just and equitable.

¹ LMC is one of the Kemper Insurance Companies, and issued the insurance policy at issue in the Fourth-Party Complaint.

Affirmative Defenses

**FIRST AFFIRMATIVE DEFENSE
(Trataros is Not an Insured)**

Bartec Industries, Inc. is not entitled to indemnification or contribution from, or to have judgment entered against, LMC because Trataros Construction, Inc. is not a named insured in the LMC Policy and Trataros Construction, Inc. is therefore not entitled to a defense or indemnification from LMC.

**SECOND AFFIRMATIVE DEFENSE
(Bartec is Not an Insured)**

Bartec Industries, Inc. is not a named insured in the LMC Policy and Bartec Industries, Inc. is therefore not entitled to a defense or indemnification from LMC.

**THIRD AFFIRMATIVE DEFENSE
(Trataros is Not an Additional Insured for Claims at Issue)**

The LMC Policy provides additional insured status where the Named Insured G.M. Crocetti, Inc. is required to provide insurance in a contract but only for liability arising from the named insured G.M. Crocetti, Inc.'s work for that party. Any liability of Trataros is the result of Trataros' conduct in insisting that G.M. Crocetti, Inc. install terrazzo over Conflow over G.M. Crocetti, Inc.'s objections. Any liability of Trataros does not arise out of G.M. Crocetti, Inc.'s work but arises out of Trataros' decisions. Trataros is therefore not an additional insured under the LMC Policy for the Terrazzo claims and Bartec Industries, Inc. is therefore not entitled to indemnification or contribution from, or to have any judgment entered against, LMC.

**FOURTH AFFIRMATIVE DEFENSE
(Bartec is Not an Additional Insured for Claims at Issue)**

The LMC Policy provides additional insured status where the Named Insured G.M. Crocetti,

Inc. is required to provide insurance in a contract but only for liability arising from the named insured G.M. Crocetti, Inc.'s work for that party. G.M. Crocetti, Inc. did not perform work for Bartec Industries, Inc. and therefore Bartec Industries, Inc. is not an additional insured under the LMC Policy for the Terrazzo claims.

**FIFTH AFFIRMATIVE DEFENSE
(Lack of Occurrence)**

The LMC Policy requires that a covered claim arise out of an "occurrence". Trataros ordered Crocetti, over Crocetti's objections, to install terrazzo flooring over Conflow, knowing that it would fail. As such, the claim does not constitute an "occurrence" and there is no duty to defend or indemnify Trataros under the LMC Policy and Bartec Industries, Inc. is therefore not entitled to indemnification or contribution from, or to have any judgment entered against, LMC.

**SIXTH AFFIRMATIVE DEFENSE
(Your Work Exclusion Bars Any Coverage)**

The LMC Policy contains an Exclusion titled "Your Work" which excludes coverage for any property damage that results from the work conducted by Trataros. As such, there is no coverage for any claim by Trataros against LMC and Bartec Industries, Inc. is not entitled to indemnification or contribution from, or to have any judgment entered against, LMC.

**SEVENTH AFFIRMATIVE DEFENSE
(Failure to Provide Proper Notice)**

The LMC Policy contains a notice condition that requires notification of an occurrence as soon as practicable and immediate notification of an offense that may result in a claim. The notice condition also requires immediate notice of a claim or suit. Trataros failed to comply with this condition and therefore there is no duty to defend or indemnify Trataros under the LMC Policy, and Bartec Industries, Inc. is therefore not entitled to indemnification or contribution from, or to have

judgment entered against, LMC.

**EIGHTH AFFIRMATIVE DEFENSE
(Other Insurance)**

The LMC Policy contains provisions that provide that if there is any other collectible insurance available to an insured, the LMC Policy will be excess of the other collectible insurance.

Bartec Industries, Inc.'s claims are barred in whole or in part to the extent that there is other collectible insurance available to the insured.

**NINTH AFFIRMATIVE DEFENSE
(Failure to State a Claim)**

The Cross-Claim fails to allege facts sufficient to constitute a claim against LMC.

**TENTH AFFIRMATIVE DEFENSE
(Failure to Properly Allege Indemnification)**

The Cross-Claimant does not satisfy all elements to properly allege indemnification against LMC.

**ELEVENTH AFFIRMATIVE DEFENSE
(Failure to Properly Allege Contribution)**

The Cross-Claimant does not satisfy all elements to properly allege contribution against LMC.

**TWELVTH AFFIRMATIVE DEFENSE
(Other Defenses)**

LMC reserves the right to amend its Answer by way of adding affirmative defenses, counterclaims, cross-claims, or by instituting third party actions as additional facts are obtained through investigation and discovery.

WHEREFORE, LMC prays that Cross-Claimant take nothing by its Cross-Claim; that LMC

be dismissed with prejudice and awarded fees and costs incurred in defending this Cross-Claim; and that this Court enter a declaration that LMC is not obligated to provide insurance coverage for Fourth-Party Plaintiffs or any other party, and for any further relief that this Court deems equitable and just.

DATED: January 14, 2008

By: s/ Michael S. Miller
Michael S. Miller
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DECLARATION OF SERVICE

The undersigned hereby declares, under penalty of perjury, that on January 14, 2008, he caused a true copy of the foregoing Answer, etc. to be served via electronic filing and first class mail upon counsel for the various parties as follows:

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DATED: January 14, 2008

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